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No. 84-1727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN E. JOHNSON,

Petitioner

v.

EDUCATIONAL TESTING SERVICE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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May 31, 1985

QUESTIONS PRESENTED

Without suggesting that *any* genuine or disputable question is in fact presented by the petition to this Court, the only questions on which the course of proceedings below and the facts of record would permit a determination by this Court are:

1. Whether the evidence presented any genuine issue of material fact precluding entry of summary judgment against the petitioner on the issues raised by her state law claims and asserted due process claim, namely,

   (a) whether the respondent was entitled under the circumstances to cancel the April 1971 LSAT score and so notify law schools, and

   (b) whether its cancellation was impermissible "state action."

2. Whether the district court's denial of petitioner's anomalous "Motion for Leave To File a Motion To Amend the Complaint" submitted twelve years after the filing of the complaint was an abuse of discretion.

TABLE OF CONTENTS

	Page
Statement of the Case	1
REASONS FOR DENYING THE WRIT	2
I. THE DECISION OF THE FIRST CIRCUIT HEREIN IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR OF THIS COURT	2
A. State Law Claims	2
B. Due Process Claim	5
II. THIS CASE PRESENTS NO ISSUES OF GREAT PUBLIC IMPORTANCE	7
CONCLUSION	8
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases

	Page
Blum v. *Yaretsky*, 457 U.S. 991 (1982)	5
Brewer v. *Wegmann*, 691 F.2d 216 (5th Cir. 1982), *cert. denied*, 461 U.S. 908 (1983)	7n.
Brown v. *Educational Testing Service*, No. C-71 2029 AJZ (N.D. Cal., January 31, 1972)	6
Crow v. *Educational Testing Service*, 703 F.2d 556 (5th Cir. 1983), *aff'g mem.* No. 80-1865 (W.D. La., April 28, 1982)	4
Foman v. *Davis*, 371 U.S. 178 (1962)	8
Gilmore v. *Salt Lake Community Action Program*, 710 F.2d 632 (10th Cir. 1983)	6
Jones v. *Board of Commissioners of Alabama State Bar*, 737 F.2d 996 (11th Cir. 1984)	6n.
K.D. v. *Educational Testing Service*, 87 Misc. 2d 657, 386 N.Y.S.2d 747 (1976)	6
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)	6
Lucero v. *Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 1308 (1984)	6-7n.
McVarish v. *Mid-Nebraska Community Mental Health Center*, 696 F.2d 69 (8th Cir. 1982)	6
Parham v. *J.R.*, 442 U.S. 584 (1979)	6
Paul v. *Davis*, 424 U.S. 693 (1976)	6
Poats v. *Givan*, 651 F.2d 495 (7th Cir. 1981)	7n.
Poller v. *Columbia Broadcasting System*, 368 U.S. 464 (1962)	2
Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982)	5
Richardson v. *McFadden*, 540 F.2d 744 (4th Cir. 1976), *cert. denied*, 435 U.S. 968 (1978)	7n.
Swencki v. *Educational Testing Service*, 740 F.2d 969 (6th Cir. 1984), *aff'g mem.* No. C. 81-0689 L(A) (W.D. Ky., May 26, 1983)	4
Tyler v. *Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976)	7n.

Rule

Fed. R. Civ. P. 56	2

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Statement of the Case

Because the issues raised by this case are essentially factual, it is unfortunate that the Statement of the Case in the petition omits or misstates many of the critical facts established in the course of proceedings below. Rather than lengthen this opposition by cataloging individual omissions and misstatements, however, the respondent, Educational Testing Service ("ETS"), relies upon the opinions below for a fuller, and fairer, overall presentation of the facts of the case. See B. B-2-4, B-6-9; A. A-2-4, A-9-10, A-13.[1]

[1] Reference abbreviations are used herein as follows: "R." refers to the record appendix in the Court of Appeals; "P." to the petition for a writ of certiorari; and "A." and "B." to Appendices A and B respectively — the Court of Appeals and District Court opinions — to the petition.

REASONS FOR DENYING THE WRIT

Contrary to the claims made in the petition, the decision of the First Circuit does not conflict with decisions of this Court or any other court, the issues raised in the case are peculiarly factual, and the case presents no issues of great public importance. Accordingly, the case does not merit Supreme Court review.

I. THE DECISION OF THE FIRST CIRCUIT HEREIN IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR OF THIS COURT.

The petition claims that the decision of the First Circuit conflicts with other decisions as to the proper standard for granting summary judgment (P. 9-11) and as to the law for determining whether action by a private party is "state action" governed by the due process clause (P. 11-14). These claimed conflicts are fictional.

A. State Law Claims.

In passing on the propriety of summary judgment against the petitioner on her state law claims, the First Circuit reviewed the record to determine whether, indulging all legitimate inferences favorable to the petitioner, she had shown the presence in the case of any genuine issue of material fact requiring a trial of her claims. See A. A-8-9. This standard of review does not conflict with, but is instead identical to, the standards for summary judgment embodied in Fed. R. Civ. P. 56 and uniformly applied by this and other courts, *e.g.*, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

As the petition makes clear, moreover, the petitioner's dissatisfaction with the First Circuit's affirmance of summary judgment on her state law claims lies not in the standard applied but rather in the conclusion reached upon its application — the court's asserted failure "properly [to] construe[ ] the record." P. 9. Examination of the record of a stale dispute to assess the existence of triable factual issues is rarely an appropriate function of this Court, and it would be par-

ticularly inappropriate in *this* case. Of the supposed errors in how the Court of Appeals "construed the record" (P. 10), none goes to the factual determinations governed by state law that led to the summary judgment. The resolution of the motion for summary judgment turned on the factual question whether ETS's finding of adequate reason to question the validity of the April 1971 LSAT score and consequent cancellation of the score were in good faith. As to that question, however, the facts were undisputed, and the petitioner's charges proved to be speculations unsupported by any evidence. The opinions below relied upon the following facts: After a question about the April 1971 score reported for the petitioner, Miss Johnson, was raised by the University of Pennsylvania Law School, ETS investigated the matter over a period of more than three months, during which it obtained information from its own files and staff, including members of its Test Security Office who individually compared the test sheets of October and December 1970 with those of April 1971 and concluded that the latter were not written by the same hand as the earlier papers (see the Appendix to this opposition), from Miss Johnson, her counsel and those who submitted information on her behalf, and from four independent handwriting analysts. This information was submitted to the ETS Board of Review, an internal body of senior ETS personnel experienced in passing on questioned test scores with exclusive authority within ETS to make findings of reason to doubt questioned scores and to cancel such scores.[2] Through the members of the Board of Review, who were unanimous in their conclusion, ETS reached the opinion that there was adequate reason to question the validity of the April 1971 LSAT score. In reaching this decision, the board was influenced by the evidence of handwriting differences on the test sheets and registration forms themselves, the opinions of the four independent handwriting analysts,

[2] Thus, the alleged statements, ascribed in the petition to "ETS officials" (P. 6), of members of the ETS Test Security Office who did not serve on the Board of Review (R. 120-21; see R. 396-99, 500-02) offer nothing material to support the petitioner's claim of bad faith.

three of whom concluded without reservation that the April 1971 test sheets were not authentic, and the statistically improbable leap in the April test score of 623 following two consistent scores in the low 300's obtained not long before in October and December of the prior year.[3] ETS offered Miss Johnson a retest, using the same test on which the questioned score was computed, at no additional fee, and advised her that it would confirm the questioned score if Miss Johnson came within 50, and possibly if she came within 100, points of the previously computed score of 623. Miss Johnson declined the offered retest option. Thereafter, ETS cancelled the April score. See B. B-6-9; A. A-2-3, A-9-10. These facts are fully supported in the record and are not disputed by the petition. Thus, as to the controlling question of adequate reason to doubt — good faith, the petitioner remains unable to point to any genuine issue of material fact rendering summary judgment inappropriate, and the First Circuit's decision is in complete harmony with decisions of other Courts of Appeals. See *Crow* v. *Educational Testing Service*,703 F.2d 556 (5th Cir. 1983), *aff'g mem.* No. 80-1865 (W.D. La., April 28, 1982) (ETS had right to withhold score based on question as to validity whether or not plaintiff in fact took test); *Swencki* v. *Educational Testing Service*, 740 F.2d 969 (6th Cir. 1984), *aff'g mem.* No. C. 81-0689 L(A) (W.D. Ky., May 26, 1983) (statistical improbability

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[3] The alleged statement that Miss Johnson's affidavit should be given "no weight" (P. 6) is not evidence of bad faith. The affidavit was considered by all Board members (R. 130; 143; 145), and the claimed determination by one of their number that the affidavit, with its wealth of detail as to every matter *except* the actual taking of the LSAT (R. 238-41), was entitled to no weight in dispelling doubt about the validity of the April score was well within the range of good faith evaluations of the affidavit. Similarly, the claimed refusals to provide Miss Johnson with identities of other persons at the test center in no way shows bad faith. Evidence of Miss Johnson's presence on the scene would not have removed doubt as to the score since she could have been at the test center and still have been impersonated. See R. 503. See also R. 470.

of standardized graduate school admissions test score's validity gave ETS good faith reason to cancel score as a matter of law).[4]

B. Due Process Claim.

The claimed conflict between the law applied by the First Circuit in disposing of the petitioner's due process claim and that of other decisions is equally insubstantial. The petition acknowledges (P. 13), albeit in a backhanded fashion, that the First Circuit's decision in this case followed this Court's decisions in *Blum* v. *Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982). See A. A-4-8. The petition, however, suggests that this case is distinguishable because of ETS's alleged "veto power" over law school admissions and the presence of "public officials" on the ETS governing board. P. 12. The alleged ETS "veto power" (less stridently characterized by the petitioner as "virtual veto power" in the courts below, see B. B-4; A. A-5) would, if it existed, be no different in kind from the private "veto power" over the payment of Medicaid benefits held *not* to constitute state action in *Blum* (457 U.S. at 1005); in fact, however, there was no evidence that any such "veto power" exists, while the University of Pennsylvania Law School's admission of Miss Johnson prior to the April 1971 LSAT at a time when her LSAT scores were 317 and 323 (R. 380) was clear evidence to the contrary. With respect to the presence of "public officials" on the ETS governing board, the petition fails to disclose that the petitioner was able to identify only one ETS board member whose regular employment was by a publicly supported institution (*compare* R. 6-7 *with* R. 15, R. 566). More important, it is undisputed that ETS Board members were chosen for their individual personal attributes and did not serve on the ETS Board in any official state capacities (R. 133-34; 313-15). There is thus presented here no conflict what-

[4] Copies of the unreported district court decisions in these cases were submitted as part of the record in the proceedings below to the district court and by leave to the First Circuit.

soever with the two cases relied on by the petition (P. 13), *Gilmore* v. *Salt Lake Community Action Program*, 710 F.2d 632, 634 (10th Cir. 1983) (federal statute dictated one-third board membership of public officials, acting in official capacities, for sponsored community action agencies), and *McVarish* v. *Mid-Nebraska Community Mental Health Center*, 696 F.2d 69, 71 (8th Cir. 1982) (state statute required appointment to board of one official for each affected public body to represent interests of governmental units). To the contrary, the First Circuit's decision is fully in accord with prior decisions of other courts passing on claims of state action in ETS's standardized admissions testing activities. *Brown* v. *Educational Testing Service*, No. C-71 2029 AJZ (N.D. Cal., January 31, 1972) (no state action in ETS's standardized graduate school admissions test administration);[5] *K.D.* v. *Educational Testing Service*, 87 Misc. 2d 657, 386 N.Y.S.2d 747 (1976) (no state action in ETS cancellation of questioned LSAT score). The claimed state action issue in this case would, moreover, be particularly inappropriate for review by this Court, given the ample demonstration in the record that the petitioner received all process which might have been due her had constitutional standards been applicable, see, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Parham* v. *J.R.*, 442 U.S. 584, 608 (1979),[6] and the absence from the record of any showing that the petitioner was deprived of any right of constitutional dimension, see, *e.g.*, *Paul* v. *Davis*, 424 U.S. 693 (1976).

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[5] Copies of this unreported decision were submitted as part of the record in the proceedings below to the district court and by leave to the First Circuit.

[6] The ample procedural protections accorded Miss Johnson by ETS were summarized by the courts below. A. A-2-3, A-10; B. B-6-10. There is, moreover, a substantial body of law in the bar examination context holding that the opportunity of a retest (as afforded to Miss Johnson), *standing alone*, provides adequate procedural protection against erroneous or arbitrary test result evaluation and reporting. See, *e.g.*, *Jones* v. *Board of Commissioners of Alabama State Bar*, 737 F.2d 996, 1002-03 (11th Cir. 1984) (limited number of retest opportunities provides sufficient due process to protect against erroneous or arbitrary examiner action); *Lucero* v. *Ogden*, 718 F.2d 355 (10th Cir. 1983) (absolute, unqualified right to retake ex-

II. THIS CASE PRESENTS NO ISSUES OF GREAT PUBLIC IMPORTANCE.

The fact-specific issues raised by the petitioner's attack on the disposition of her state law claims can have little importance to anyone other than the parties to this case. The facts raising questions about the validity of the April 1971 LSAT score and the specific actions of ETS in connection therewith are unique to the petitioner's case, and the propriety of summary judgment on those facts would be of minimal direct interest to others than the parties. On the other hand, the supposed state law issue of importance urged by the petition — whether the LSAT complied with ETS's alleged "warranty" therefor[7] (see P. II (Question Presented 7.), 7) — is simply not present in this case, because the petitioner never pled nor otherwise advanced below a claim of damage from any alleged breach of warranty, and thus failed to present any concrete controversy as to this supposed issue.[8] See R. 10 (Complaint, ¶¶20-21); A. A-9; B. B-6.

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amination satisfies due process), *cert. denied*, 104 S. Ct. 1308 (1984); *Brewer* v. *Wegmann*, 691 F.2d 216 (5th Cir. 1982) (retest satisfies due process need to protect against reporting of incorrect score), *cert. denied*, 461 U.S. 908 (1983); *Poats* v. *Givan*, 651 F.2d 495, 497 (7th Cir. 1981) ("the possibility of re-examination satisfied due process"); *Tyler* v. *Vickery*, 517 F.2d 1089, 1103-05 (5th Cir. 1975) (due process not offended by lack of review procedures "primarily because an unqualified right to retake the examination . . . both satisfies the purposes of a hearing and affords its protection"), *cert. denied*, 426 U.S. 940 (1976). *Contra, Richardson* v. *McFadden*, 540 F.2d 744, 752 (4th Cir. 1976), *cert. denied*, 435 U.S. 968 (1978).

[7] ETS disclaimed that the test was in any way an infallible or perfect predictor. R. 345-47. It cautioned that the LSAT was not an intelligence test (R. 345), that while the correlation between test scores and law school grades was not perfect, the test did predict which students are most likely to do well (R. 346), and that law schools are aware that the test does not measure all the factors that are instrumental in determining a successful student (*id.*).

[8] Indeed, the relief sought by the petitioner from the outset was an order that the April score be declared valid, relief flatly inconsistent with any claim that the score was somehow defective because in breach of a supposed warranty as to reliability. See R. 13.

Equally without significance to others is the disposition of the petitioner's due process claim. In the fourteen years that have passed since the events at issue in this case, responsibility for LSAT administration and test security has passed from ETS to an unrelated entity, Law School Admission Services, Inc., in whose affairs ETS plays no role and to whose actions in questioned score cases a decision by this Court concerning possible state action in ETS's doings in 1971 would have no relevance. See R. 793-95.

Similarly inconsequential is the trial court's denial of the petitioner's eleventh hour "Motion for Leave To File a Motion To Amend the Complaint." This anomalous motion was submitted to the district court without any proposed amended pleading disclosing what, if any, claims the petitioner would seek to assert, without any showing of merit in those supposed new claims, and without any explanation for her delay of over a decade in seeking to advance new claims. R. 895-96. Whether as a matter of law or as a matter of discretion, denial of this untimely, open-ended and unsupported motion was wholly proper. *E.g.*, *Foman* v. *Davis*, 371 U.S. 178 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 31, 1985

APPENDIX

COMPARISON OF 1970 (OCTOBER AND DECEMBER) TEST SHEETS WITH 1971 (APRIL) SHEETS

Among differences that can be observed between the original[1] 1970 and 1971 test sheets are the following:

1970 — The printing in the 1970 sheets has a vertical cast and the script is close to vertical;
1971 — the handwriting and printing in the 1971 sheets both have a decided slant to the right.

1970 — All the i's are dotted;
1971 — None of the i's are dotted.

In the 1971 sheet, the writer appears to have misspelled Ethelyn in the signature on the first try.

1970 — The n in Haven is a smaller version of the capital N in New;
1971 — The n in Haven has the standard configuration of a small n topped by a horizontal line.

1970 — The capital A's are all rendered by a triangle;
1971 — The capital A's are rendered with a curved to a flat top.

1970 — The small printed v is made by two straight lines, with the right-hand line finishing the higher of the two;
1971 — the lines of the v's are concave and the right-hand line generally finishes the lower of the two.

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[1] These differences most clearly appear in the original test sheets submitted by leave to the Court of Appeals and made part of the record in the possession of the clerk of that court. The copies in the record appendix in the Court of Appeals are too indistinct to enable a proper comparison.

1970 — As in the case of the v's, the small w is made by straight lines, the last line being the highest;

1971 — the w has curved bottoms and is uniform in height.

1970 — The small u finishes with a straight vertical leg;

1971 — the u has no finish leg and looks like one-half of the 1971 w.

1970 — The small r is closed, with relatively straight lines and the right side tends to be higher than the left;

1971 — the r is open with concave lines (like the 1971 v's) and the right side is lower than the left.

1970 — On the upper left and side margin, only the first letter, J, of the four letters in the abbreviated name John is capitalized;

1971 — all four letters of JOHN are capitalized.

1970 — The d in the printing appears to be made by separate strokes — a vertical stroke with a bottom loop separately made;

1971 — the d in the printing appears to be made conventionally with a continuous stroke.

1970 — The second leg of the script n diverges radically from the first leg;

1971 — the second leg of the n is conventional.